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CHARLES ELMORE CROPLEY
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In the

Supreme Court of the United States

OCTOBER TERM, 1951

No. 975

TWENTIETH CENTURY-FOX FILM CORPORATION, ET AL.,

Petitioners,

against

BROOKSIDE THEATRE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc., Loew's Incorporated, RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Warner Bros. Theatres Distributing Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc., and United Artists Corporation,

Petitioners.

By: JOHN P. CARNEY,
DUDLEY SHARPLES,
WILLIAM E. KNOX,
Attorneys for Petitioners.

March 28, 1952.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on February 11, 1952.

STATEMENT UNDER RULES 27(d) AND 38(2)

This is a suit for treble damages under Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. Section 4).

Respondent is a Missouri corporation organized in July, 1936. In September of that year it became the lessee of the

neighborhood Brookside motion picture theatre in Kansas City, Missouri. The lease was for a fifteen-year term commencing March 1, 1937. Respondent operated the theatre from March 6, 1937, to November 22, 1937. On November 22, 1937, plaintiff assigned the lease of the theatre and sold its equipment to a corporation in which the petitioner Twentieth Century-Fox had a minority interest for a consideration of approximately $43,300 (R. 2125) which sum returned its two stockholders their full investment and a profit.* Subsequent to the assignment of the lease respondent's only stockholders permitted its charter to be forfeited under the Missouri statutes and the corporation conducted no business after November, 1937 (R. 860, P. Ex. 85). The forfeiture was cancelled in June, 1949, and plaintiff brought this action on June 27, 1949.

The petitioners are distributors of motion pictures, each of which maintains a sales office in Kansas City, Missouri.

The crux of plaintiff's complaint is that after the formation of the corporation in 1936, Fulton and Schwartz, its sole stockholders, attempted to secure pictures from all of the defendant distributors for the 1936-1937 season. Plaintiff claimed that it was unable to secure any pictures because of an exclusive agreement which the defendant distributors had with the operators of the Waldo theatre in Kansas City. Plaintiff claimed that as a result of a conspiracy between the defendant distributors it was unable to secure pictures for its theatre or was unable to obtain pictures to play as early as it desired and was

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*The actual purchaser was The Lufton Corporation and the operator Fox Kansas City Corporation, both wholly owned subsidiaries of Fox Midwest Theatres, Inc., which was a wholly owned subsidiary of National Theatres Corporation. From 1937 to 1943 National was a partially owned non-controlled subsidiary of Twentieth Century-Fox and thereafter a wholly owned subsidiary. None of these corporations was made a defendant. For convenience in this petition the operator of the theatre will be called Fox Midwest.

forced to assign its lease and to sell its equipment to Fox Midwest. It was further claimed that because of the forced sale, it had lost the profits which it would have made had it continued to operate the Brookside until the expiration of its lease.

Defendants denied the allegations of the complaint and contended that they had acted independently in dealing with the Brookside theatre. In support of this contention they offered in evidence the decision in *Rolsky* v. *Fox Midwest Theatres*, C. C. H. Trade Reg. Serv., Court Decisions Supplement, 1932-1937, Para. 7484 (D. Mo., 1936). This case was brought by independent exhibitors in Kansas City to enjoin these same defendants from licensing pictures by the identical method of which the Brookside complains in this action. The court, in the *Rolsky* case, held that the distributors had not violated the anti-trust laws; that each distributor had acted independently in licensing its pictures and that there was no conspiracy. The trial court refused to permit the defendants to introduce the decision in the *Rolsky* case or the issues therein and refused to permit petitioners' branch managers to testify that in dealing with the Brookside they believed that, under the decision in the *Rolsky* case, the method of distribution was lawful.

On the trial of the action, plaintiff recovered treble damages totaling $1,125,000. On the appeal by the defendants, the defendants contended that the verdict and the judgment were the result of, among other things, errors committed by the trial court with respect to the admissibility in evidence of the proceedings in *United States* v. *Paramount* and the references to those proceedings by plaintiff's counsel and the court, the measure of damages and the erroneous ruling of the trial court on the statute of limitations. The Court of Appeals affirmed the judgment of the District Court *in toto* except that it reduced the attorney's fee allowance by one-third.

The *Paramount* case

During the trial the court permitted plaintiff's attorney to refer to *United States* v. *Paramount* in his opening and closing statements, to recite at length his version of the charges made by the United States and to tell the jury that the defendants had lost the case after ten years of litigation including two unsuccessful appeals to the Supreme Court of the United States (R. 171-176). The trial court permitted the introduction in evidence of the original petition, the bill of particulars, the amended and supplemental complaint, the findings of fact and conclusions of law, the final decree against Columbia, Universal and United Artists and the final decree against Loew's, Warners, Twentieth Century-Fox and National Theatres (R. 246-248). Plaintiff's counsel read forty-eight of the findings of fact and certain conclusions of law in the *Paramount* case to the jury (R. 220-237, 245-248). The conclusions referred to National Theatres, not a defendant in the action, and to Paramount and RKO, although the court had excluded from evidence the decrees entered as to those defendants. In addition plaintiff's counsel was permitted to examine certain of defendants' witnesses as to whether they had given the same testimony in the *Paramount* case (R. 2422-2423, 1503) and then to state to the jury that defendants had not been believed in that action (R. 2496, 2562-2564, 2568). The court allowed the answers to interrogatories filed by various defendants in the *Paramount* case to be received in evidence against the defendants (R. 286).

The Court of Appeals relying on *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951), held that the introduction of the primary record in the *Paramount* case was proper in the light of the court's instructions to the jury that they could not find a verdict in favor of plaintiff simply because the defendants had been unsuccessful litigants in the *Paramount* case. The

opinion made no mention of the other references to the *Paramount* case during the trial and held that there had been no error in the trial court's treatment of the *Paramount* case.

Proof of Damages

To prove its damages, plaintiff introduced the amount of profits made and estimated to be made by Fox Midwest (which was not a defendant) in operating the Brookside theatre during the period subsequent to plaintiff's assignment of the lease up until the future expiration date of the lease on February 28, 1952. Plaintiff's accountant testified that from November 20, 1937, to August 18, 1950, the date of his audit, the net profits realized from the operation of the Brookside theatre were $317,478.02 (R. 729). This figure, unsupported by the Fox Midwest books, was derived by disallowing certain expenses carried on those books, including all depreciation, maintenance of a pension fund, administrative expenses, interest and income taxes. In addition, plaintiff projected a hypothetical earning figure of $64,000 from August 18, 1950, to the expiration of the lease on February 28, 1952 (R. 2514). The sum of these two amounts equals approximately $380,000. The jury's verdict was $375,000.

Throughout the trial the defendants contended that future profits were not the proper measure of damages but that any damages suffered by the plaintiff should be measured as of the date of the sale. In support of this contention defendants introduced evidence to show the market value of the lease on the date of the sale. Defendants' theatre expert testified uncontradicted that the value of a theatre operated on a leasehold was approximately four times its annual earnings (R. 2352). The case, however, was tried on the theory that plaintiff was entitled to have considered, in determining

its damages, the profits it might have made down to the expiration of its lease in 1952 and that these profits could be measured by the profits actually realized by Fox Midwest plus the projected profits for the remainder of the lease based on the earnings realized during the first 33 weeks of 1950. This theory was apparently interpreted by the jury to give plaintiff all of Fox Midwest's profits for the fifteen year period. The theory completely ignored the unforeseeable change in economic circumstances produced by the wartime economy. The evidence produced by both plaintiff and defendants revealed that from 1938 until 1941 Fox Midwest either lost money on its operation of the Brookside (D. Ex. 84) or, according to plaintiff's testimony, made an inconsequential profit of $19,603.52 for the four year period (R. 723-726).

The Court of Appeals rejected defendants' arguments with respect to the measure of damages and held that because the judge had instructed the jury that profits derived by Fox Midwest were only one of the elements to be considered in determining damages suffered by the plaintiff, there had been no error. But the amount of the verdict clearly indicates that the jury considered no other element in determining damages and in effect awarded plaintiff Fox Midwest's profits.

The Court of Appeals states in its opinion that the defendants cannot object to the theory of damages advanced by the plaintiff or to the judge's charge on damages because of a request to charge submitted by the defendants which asked the court to charge the jury that they might take into consideration the amount of the net earnings of the Brookside theatre for the period it was operated prior to the sale on November 20, 1937, and also the earnings of that theatre for a reasonable period of time following the sale as would indicate the earning power of the theatre when operated free from the effects

of the conspiracy. The history of this request clearly shows that by making this request defendants were in no way acquiescing in the introduction of Fox Midwest's profits in evidence or the charge with respect thereto. After a pre-trial conference at which the conflicting propositions on the proper theory of the measure of damages were argued, the court filed a memorandum in which it stated its theory of damages (R. 129). Under this theory the plaintiff would be allowed to present to the jury "the loss of profits which the plaintiff may have sustained during the time of the lease as an element to be considered in determining the amount of damage to its business" (R. 129). Repeatedly during the trial, this theory of the measure of damages was challenged by the defendants and adhered to by the court. At the end of the trial, counsel for both parties submitted requests for instructions with respect to damages. At a hearing in chambers on these requests the court informed defendants that it proposed to adhere to its theory that the total earnings of the Brookside theatre, actual and projected, were an element which the jury might consider. Accordingly, after this ruling, counsel for the defendants presented a revised request which endeavored to incorporate the court's ruling in a manner which would be least prejudicial to defendants. This revised request cannot now constitute an estoppel or acquiescence by the defendants in the court's theory of the measure of damages. The court and plaintiff's counsel were fully apprised of the basis of defendants' objections. This is all the rules require.

It is obvious from the verdict of the jury that the jury interpreted the judge's charge as allowing them to assess damages in the amount of the profits made by Fox Midwest during its operation of the Brookside. Plaintiff's accountant had testified that on August 18, 1950, Fox Midwest should "have in the bank"

$317,478.02.* The hypothetical projected profits for the period from August 18, 1950, to February 28, 1952, were $64,000. The amount of the verdict given by the jury was $375,000.00. There can be no doubt that what the jury actually gave plaintiff was the amount of profits made by Fox Midwest during its operation of the Brookside.

Statute of Limitations

Petitioners RKO, Paramount, Twentieth Century-Fox, Loew's and Warners seek review on the additional ground that plaintiff's cause of action was barred by the three-year statute of limitations of the State of California.** The complaint was filed on June 27, 1949. Plaintiff's cause of action accrued on November 20, 1937. The trial court ruled that, although the California statute applied, the running of the statute of limitations had been tolled by the pendency of *United States* v. *Paramount Pictures* pursuant to Section 5 of the Clayton Act.

On July 20, 1938, the United States filed a petition in equity against RKO, Paramount, Twentieth Century-Fox, Warner, Loew's and other companies, and after nearly two years of preparation, the trial was begun in June, 1940. At the conclusion of the opening statements by counsel and prior to the taking of any testimony, the trial was adjourned for the purpose of permitting the Government and certain of the defendants, including these five petitioners, to negotiate a consent decree. These negotiations continued until the latter part of

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*This figure should never have been mentioned to the jury. It was not "profit" and to call it such "before depreciation" and other charges was misleading and highly prejudicial.

**The action was originally brought in the United States District Court for the Southern District of California, and was transferred on defendants' motion under 28 U. S. C. Section 1404(a) to the United States District Court for the Western District of Missouri.

October, 1940, when a proposed consent decree was presented to the court and the court set November 14, 1940, as the date for a hearing. Thereafter, on November 14, 1940, the United States filed an amended complaint and in the prayer for relief asked for "a final decree". On November 20, 1940, these defendants and the Attorney General of the United States, with the approval of the court, consented to the entry of a decree.

On August 7, 1944, the United States filed an application for modification of the Consent Decree. An expediting certificate was filed by the United States and hearings were held before a Three-Judge Statutory Court. On June 11, 1946, that court rendered its opinion, and on December 31, 1946, findings of fact and conclusions of law were made and a decree was entered which set aside the provisions of the 1940 Decree. On appeal, the Supreme Court affirmed in part, reversed in part and remanded to the District Court.

On November 8, 1948, prior to the taking of any testimony on the remand, a final decree was entered, by consent, as to RKO, and as to Paramount a consent decree was entered before any decision was rendered on the proceeding after the remand. The proceedings on the remand were pending against Twentieth Century-Fox, Loew's and Warner on the date when plaintiff commenced this action.

Petitioners contend that the *Paramount* case was not pending from November 20, 1940, the date of the Consent Decree, until August 7, 1944, the date of the Government's application to modify the Consent Decree. That is, they say that the statutes of limitation were running against the plaintiff during this period of three years and eight months.

Moreover, it is the contention of petitioners that the Wartime Suspension Act, effective October 10, 1942, did not toll statutes of limitation applicable to private actions under the anti-trust laws.

Both the trial court and the Court of Appeals held that the 1940 Consent Decree was not a final decree which terminated the litigation. It was therefore unnecessary for either court to rule on whether the Wartime Suspension Act applied to all anti-trust cases or simply those actions instituted by the Attorney General.

OPINIONS BELOW

The District Court rendered no opinion. Its judgment (R. 2670) is unreported. The opinion of the Court of Appeals appears at pages 4-25 of Vol. IX of the record and is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1952 (R. Vol. IX, pp. 25, 26). The jurisdiction of this Court is indicated under 62 Stat. 928, 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erroneously sanctioned the manner in which the trial court permitted references to *United States* v. *Paramount* in (a) the opening argument of counsel, (b) in the admission of evidence during the trial of the case and (c) in the closing argument of counsel although the procedure followed contravened the procedure established for the use of a decree under Section 5 of the Clayton Act?

2. Whether the court below erroneously sanctioned the judge's charge with respect to the *Paramount* case, which

charge violated the rule established by this Court in *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951), by leaving the determination of the *prima facie* estoppel to the jury rather than informing them of the facts which constituted that estoppel?

3. Whether the decision below adopted an erroneous measure of damages which resulted in permitting plaintiff to recover all of the profits made by a subsidiary of a defendant during the period of a leasehold rather than the fair market value of its lease at the date of the "forced" sale?

4. Whether the court below and the trial court, in construing the 1940 Consent Decree entered into by five of the petitioners and the United States Government in *United States* v. *Paramount*, erred in holding that said Decree was not final because this Decree contained a three year "trial period" and was subsequently modified on application of the Attorney General?

5. Whether the Wartime Suspension Act was intended to apply to anti-trust actions brought by private litigants as well as actions brought by the United States Government?

If the petition is granted, the petitioners will also argue:

6) That the Court of Appeals erred in sanctioning action by the District Court in excluding from the jury the fact that in August, 1936, the United States District Court for the Western District of Missouri in an action then pending, entitled *Rolsky* v. *Fox Midwest Theatres*, in which counsel for the present respondents was counsel for the plaintiffs, determined that the method of licensing motion pictures in issue in this case was lawful.

7) That the Court of Appeals erred in sanctioning the action of the District Court in denying a mistrial of this action and in denying a new trial because of the inflammatory and scandalous closing arugment of one of plaintiff's attorneys. *N. Y. Central R. R. Co.* v. *Johnson,* 279 U. S. 310 (1929).

REASONS FOR ALLOWANCE OF THE WRIT

1. The manner in which the trial court permitted *United States* v. *Paramount* to be referred to throughout the trial and in its charge to the jury contravened the rule established by this Court in *Emich Motors* v. *General Motors,* 340 U. S. 558 (1951).

Section 5 of the Clayton Act provides that a final decree or judgment entered against a defendant in any proceeding brought by the Government under the anti-trust laws shall be *prima facie* evidence against that defendant in any subsequent action brought by any other plaintiff under the anti-trust laws as to all matters which would be an estoppel as between the Government and the defendant. This Court has construed this section and outlined the proper procedure for dealing with a government decree in the *Emich* case. In that case the proposed treatment of a prior government decree ranged from petitioners' contention that the entire record in the government case should be admissible in the private action to the respondents' contention that none of the proceedings in the prior action was admissible. This Court carefully reviewed the history of Section 5 and concluded that the decree or judgment could be introduced as an estoppel to questions "distinctly put in issue and directly determined in the prior action." The determination of what was established in the prior suit was expressly

deemed by this Court "a question of law as to which the *court** must instruct the jury" (340 U. S. 571). In the very words of this Court, *"It is the task of the trial judge** to make clear to the jury the issues that were determined against the defendant in the prior suit, and to limit to those issues the effect of that judgment as evidence in the present action." (Ibid.) In summarizing the procedure to be followed in a subsequent action this Court stated that *the trial judge* should examine the record in the prior case, instruct the jury as to the issues determined and explain the scope and effect of that judgment on the case at trial.

There can be little doubt that the *Emich* case places the burden of informing the jury of the issues in the prior case on the trial judge and on no other person. This procedure was radically departed from in the instant case. Plaintiff's counsel was permitted to present to the jury his own interpretation of the issues tried and determined in the *Paramount* case. He was permitted to give his version of the history of that case; to inform the jury that some of defendants' present attorneys had also been their attorneys in the *Paramount* case; that defendants had been found "guilty" and branded as "monopolists" and "law breakers". There is absolutely no authority in the *Emich* case for such unorthodox use of a prior judgment.

Similarly, the reading of the findings of fact and conclusions of law entered in the *Paramount* case to the jury by plaintiff's attorney invaded the province of the court as established in the *Emich* case. The *Emich* case involved the use of a criminal judgment. Consequently this Court did not have the problem of the treatment of findings and conclusions directly before it. Yet there can be no doubt that the estoppel established by any findings is a question of law for the Court and not the jury. By permitting an indiscriminate

*Emphasis supplied.

reading of the findings to the jury, the Court allowed the jury to consider findings as to which there could not be any estoppel. Many of these findings were not ultimate facts but merely evidentiary facts which could not constitute any estoppel in a subsequent action. The Court of Appeals' condonation of this procedure squarely conflicts with this Court's decision in *Emich Motors* v. *General Motors.*

There are now pending in the several district courts about 150 actions against these defendants which involve charges of conspiracy based in part on the conspiracy found in the *Paramount* case. If the decision in the instant case is not reviewed, it will be urged by plaintiffs' attorneys, in these other actions, that the procedure adopted in this case with respect to the treatment of *United States* v. *Paramount* should be followed. It will be urged, in these other cases, that attorneys are entitled to usurp the functions of the court and inform juries in any manner they desire of the determinations in that case. This would be clearly contrary to the limited use of a prior decree and judgment permitted under Section 5 as construed by this Court in the *Emich* case. It would constitute complete disregard of the determinations there made.

2. The trial court permitted plaintiff to introduce evidence of the profits realized by Fox Midwest during its operation of the Brookside although there is no evidence that any defendant, including Twentieth Century-Fox, ever got a cent of such profits.* The reception of this evidence and the charge with respect thereto permitted the jury to award plaintiff loss of future profits as its measure of damages rather than the differ-

*As pointed out in the footnote on p. 2 of this petition, the actual purchaser was The Lufton Corporation, a subsidiary of Fox Midwest. There was no evidence that either of the corporations ever declared any dividends which were paid to Twentieth Century-Fox.

ence, if any, between the fair market value on the date of the sale and the amount which plaintiff actually received.

In *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555 (1931), it is clear that in a situation where a plaintiff in an anti-trust action has been "forced" out of business by reason of a conspiracy in violation of the anti-trust laws, that plaintiff may recover (1) loss of profits during the time when it was in business and (2) the diminished value of its business *measured as of the date of its abandonment.* Plaintiff in the *Story Parchment* case brought its action under the anti-trust laws, claiming that the defendants had conspired to reduce the price of parchment paper in order to *force* the plaintiff out of business and that as a result of that conspiracy it was *forced* out of business. The trial court submitted two items of damage to the jury: (1) the difference, if any, between the amounts actually realized by plaintiff from sales made by it when it was operating and what it would have realized from those sales at reasonable prices except for the unlawful acts of the defendants, and (2) the extent to which the value of plaintiff's property, a specially constructed plant, had been diminished as a result of the unlawful acts. The jury returned a verdict for the plaintiff in the amount of $65,000. The Circuit Court of Appeals reversed (37 F. 2d 537 [C. C. A. 1st, 1930]), but the Supreme Court reinstated the verdict.

Although the trial court in the instant case correctly ruled that plaintiff was not entitled to recover loss of prospective profits, the effect of the reception of the evidence of profits permitted plaintiff to measure its damage as of the date of the trial rather than at the date of its sale.

This violated the rule of the *Story Parchment* case that a person who has suffered damage as a result of wrongful conduct may at his election follow either of two courses: (1)

he may continue to operate the business and sue for loss of profits; or (2) he may terminate his interest in the business and sue to recover the depreciated value of his business. He may not elect to abandon his business and sue to recover loss of *future* profits. That is what the trial court permitted plaintiff to do in this action.

The Court of Appeals assumes in its opinion that because the trial court instructed the jury that the profits and projected profits were one of the factors to be considered in determining the value of plaintiff's property on the date of sale, there was no error. The verdict of the jury clearly indicates that this instruction was completely disregarded by the jury and the damages awarded were in fact "the profits" realized by Fox Midwest's operation of the Brookside.

If the jury had determined the value of plaintiff's business as of the date of the sale, the excessive verdict brought in by the jury could not have resulted. The defendants' evidence showed that the standard value of a theatre leasehold is four times its annual earnings. The verdict rendered by the jury was far in excess of four times the annual earnings of the Brookside, even during that period when it was operated by Fox Midwest.

Moreover, if the jury had determined the value of plaintiff's business as of the date of the sale, evidence of the economic conditions existing in 1937 at the time of the sale (R. 1956, 1969) would have compelled a lower verdict. In 1937 no reasonable person could have foreseen the drastic change in economic conditions which occurred in the forties. The verdict of the jury is proof that it did not value the Brookside theatre in the light of conditions existing at the time of the sale but valued the theatre in the light of unforeseeable conditions which resulted from the impact of a wartime economy.

If this decision is permitted to stand, it may be interpreted in future cases as allowing a jury to determine damages resulting from a "forced" sale or destruction of property as of the date of the trial rather than the date of the sale or destruction. This theory is not supported by the decisions and is opposed to principles of justice.

3. The ruling of the court below that the 1940 Consent Decree entered against five of these petitioners in *United States* v. *Paramount* was not a final decree completely ignores the character and nature of a consent decree. This Court has consistently recognized that in legal effect a consent decree is indistinguishable from a contested decree. *United States* v. *Swift & Co.*, 286 U. S. 106 (1932).

The Court of Appeals assumed that, because the Consent Decree entered in the *Paramount* case reserved to the United States the right at the end of three years to apply for further relief, the litigation was not terminated. The lack of logic in this assumption is patent.

If the Government had been satisfied that the 1940 Consent Decree restored competition and had not moved in 1944 to modify the Decree, no one would argue that the Decree was not final and that the statute was tolled forever. Suppose that the Government had decided to file a new complaint making substantially similar charges: such action could not be used in any way to argue that the 1940 Consent Decree was not final. Instead of doing that, the Government recognized that the Consent Decree was final and that there was no proceeding pending against the five defendants. Knowing that an estoppel existed as to certain trade practices alleged in the amended petition of November 14, 1940, upon which the Consent Decree had been entered, and desiring to rely on evidence as to those practices

as showing the necessity for divorcement, divestiture and dissolution, it moved to modify the Decree.

Economic conditions, today, require the inclusion of a trial period in which to give defendants a reasonable time to correct the alleged evils of an industry before the Government seeks by modification of a decree or by new proceedings further and more drastic relief. Many consent decrees entered into today contain similar provisions. See consent decrees entered in *U. S. v. Libbey-Owens-Ford Glass Co.*, C. C. H. Trade Reg. Serv., Para. 62,323 (N. D. Ohio, 1948), which provides for a three year trial period, the consent decree in *U. S. v. Owens-Corning Fiberglas Corp., et al.*, C. C. H. Trade Reg. Serv., Para. 62,442 (N. D. Ohio, 1949), which provides for a five year trial period, and the consent decree in *U. S. v. American Society of Composers, Authors and Publishers, et al.*, C. C. H. Trade Reg. Serv., Para. 62,594 (S. D. N. Y., 1950), which provides for a five year trial period.

This Court has not previously determined the effect of this type of provision on the finality of a consent decree. It is strongly urged that if the decision below is not reviewed the Government's future use of consent decrees will be seriously hampered. To hold that insertion in a consent decree of a clause preventing the Government from applying for further relief within a designated period, leaves the case pending against the defendants and tolls the running of the statute of limitations, would tend to discourage the entry of consent decrees. This result will be contrary to the clear intent expressed by Congress in adopting Section 5 of the Clayton Act.

4. Both courts below, erroneously assuming that the *Paramount* case was pending from 1940 until the entry of the final decree, avoided determining whether the Wartime Sus-

pension Act (56 Stat. 781, as amended by 59 Stat. 306) was intended by Congress to toll the statutes of limitation applicable to actions by *private parties* under the anti-trust laws.

The lower court decisions of other courts are not uniform. Judge Leibell, in *Fifth and Walnut* v. *Loew's, Inc.* (S. D. N. Y., 1948, Civ. No. 36-736, unreported), held that in his opinion, "the statute of limitations that was supposed to be suspended was one in reference to Government prosecutions and Government civil suits." See, also, *National Supply Co.* v. *Hillman,* 57 F. Supp. 4 (W. D. Pa., 1944). Decisions in other courts have reached a contrary result. See *Tiffin Building Corp.* v. *Balaban & Katz Corp.,* 87 F. Supp. 121 (N. D. Ill., 1949); *United West Coast Theatres Corp.* v. *South Side Theatres,* 86 F. Supp. 109 (S. D. Calif.,1949); *Russellville Canning Co.* v. *American Can Co.,* 87 F. Supp. 484, 500 (W. D. Ark., 1949); and *Winkler-Koch Engineering Co.* v. *Universal Oil Prod. Co.,* 96 F. Supp. 1015 (S. D. N. Y., 1950).

Petitioners strenuously urge that the legislative history of the Act clearly indicates that Congress intended this statute to toll only those statutes applicable to criminal prosecutions and civil proceedings by the United States. Although the precise question has not been determined by this Court, the recent decision in *United States* v. *Smith,* 342 U. S. 225 (1952), gives some indication of this Court's belief as to the intent of a similar Wartime Suspension Act. It is of utmost importance that this Court determine the intent of Congress in passing this statute.

CONCLUSION

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court,

directed to the Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all of the proceedings herein, and to the end that the judgment of said Court of Appeals may be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem just; and your petitioners will ever pray.

TWENTIETH CENTURY-FOX FILM CORPORATION
PARAMOUNT PICTURES INC.
LOEW'S INCORPORATED
RKO RADIO PICTURES, INC.
WARNER BROS. PICTURES, INC.
WARNER BROS. PICTURES DISTRIBUTING CORPORATION
COLUMBIA PICTURES CORPORATION
UNIVERSAL FILM EXCHANGES, INC.
UNITED ARTISTS CORPORATION
Petitioners.

By: JOHN F. CASKEY,
BYRON SPENCER,
WILLIAM E. KEMP,
Attorneys for Petitioners.

21

Supreme Court, U. S.
FILED
APR 14 1952
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 674.

TWENTIETH CENTURY-FOX FILM CORPORATION ET AL., PETITIONERS,

VS.

BROOKSIDE THEATRE CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 674.

TWENTIETH CENTURY-FOX FILM CORPORATION ET AL., PETITIONERS,

VS.

BROOKSIDE THEATRE CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

STATEMENT.

No conflict of decision with another circuit is claimed; nor is it claimed that any important, new or novel question of law, federal or otherwise, is involved. A neutral source, the Court of Appeals (Vol. IX, pp. 23, 24), describes the case as follows:

> "The case was * * * not a pioneer but had many predecessors involving substantially the same issues. It contained no novel questions * * * prior cases in the same field had charted the course and procedure to be followed."

Petitioners' attempt to obtain "another hearing" by use of the writ might be laid to the zeal of counsel but the method by which they seek to invoke attention of this court cannot be overlooked. We refer to serious misstatements of the record in certain particulars.

Before answering each contention now urged and calling attention to misstatements deemed important, we summarize briefly the case alleged and proved.

Petitioners, in carrying out the objects and purposes of their conspiracy described in *United States* v. *Paramount*,[1] drove respondent out of business in 1936-1937 by forcing respondent to turn over to a subsidiary of one of them (Fox) respondent's Brookside Theatre in Kansas City, Missouri.

Respondent, by appropriate contracts early in 1936, arranged for the building of this new and strategically located theatre seating a minimum of 1100 persons, beautifully designed by theatre architects, elaborately furnished and equipped and acquired a 15-year lease on the theatre (R. 427-430).

All petitioners (commencing in July, 1936) refused (R. 458-486) to negotiate with respondent for feature pictures, asserting that they had granted the Fox Waldo Theatre

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[1] *U. S.* v. *Paramount*, 334 U. S. 131, 68 S. Ct. 915, affirming in part and reversing in part 66 F. Supp. 323. The proceedings after remand are reported in *U. S.* v. *Paramount*, 85 F. Supp. 881, affirmed in 339 U. S. 974, 70 S. Ct. 1032, rehearing denied 71 S. Ct. 70.

(nearest Fox theatre to the Brookside Theatre but 20 blocks to the south) an exclusive run and that they could not serve respondent at all on any terms at any price, without consent of the Fox subsidiary, which consent was refused (R. 1356, 2396). Original opening date of the Brookside scheduled for December 24, 1936, was moved up to March 1, 1937 (R. 524, 525). By that date some of petitioners agreed to furnish pictures but *only upon condition* that the Brookside maintain an admission price of 25 cents and play the pictures after they had been played at the Fox Waldo which maintained an admission price of 20 cents (R. 489-90, 492, 508, 511, 526-29) (See Plaintiff's Exs. 66, 68, 73, 100, Vol. VIII, Supp. R. 7-9, 15, 17-19). Fox, Warner Bros. and RKO, without whose pictures a subsequent run theatre cannot successfully operate (R. 1294, 1295), continued their unqualified refusal to furnish any product (R. 531).

From March 1, 1937, to November 20, 1937, respondent operated the Brookside with the limited product available on the condition imposed which also meant (under the operation of the uniform zoning and clearance schedule maintained by petitioners in Kansas City, Missouri) that the Brookside charging 25 cents as required had to *play* after every 20 cent house in Kansas City and even after some 15 cent houses but *pay* a film rental greatly in excess of that paid by Fox Waldo or any other 20 cent house (see Plaintiff's Ex. 132, Vol. VIII, Supp. R. 33-121). To increase pressure on respondent, Fox Waldo adopted a late dating and booking policy coupled with frequent cancellations so that it was virtually impossible for respondent to know what pictures would be available or when they would be available even of those petitioners willing to furnish same conditionally (R. 506, 512, 552, 553, 554 and see Plaintiff's Exs. 5, 158, 159, 160, 161, Vol. VIII,

Supp. R. 144-47). To keep the doors open, respondent was compelled to run pictures of such small producers as Grand National, Majestic and Republic and to play other inferior, re-issue or rejected pictures not played by Fox Waldo (R. 506, 507, 512, 538, 549, 953).

Having exhausted all possibilities in Kansas City to obtain relief, respondent in the fall of 1937 made a personal plea to Spyros Skouras, head of all Fox theatre operations in the United States, to give the consent that would allow respondent to receive an adequate and normal supply of feature pictures (R. 623, 1361). Skouras flatly refused, declaring that Kansas City was a "Fox town," especially the south side of Kansas City, and "we expect to keep it as such. You had no business coming in there" (R. 1362). Skouras advised respondent to transfer the theatre to Fox, saying, "we can get the pictures" (R. 1362).

Having no other alternative but to close the theatre (R. 657-658) respondent finally capitulated and on November 20, 1937, after a second ultimatum by Elmer Rhoden, head of all Fox theatre operations in Kansas City (R. 663, 664, 1367) transferred its 15-year lease, business and property constituting the Brookside Theatre to Fox at the inventory value of the furnishings and equipment, *which value was fixed by Fox without negotiation* (R. 668, 1369). Before taking this step, respondent in October, 1937, wrote the Department of Justice complaining of the situation (R. 626, 627, 649-53, 655, 656, 1363, 1364) (See Plaintiff's Exs. 106 and 107, Vol. VIII, Supp. R. 23, 24, 28, 29). In the contract of transfer (drafted by the Fox attorney, who had been made aware of respondent's complaint to the Department of Justice (R. 661, 662, 2489)), there was included a "silencing provision" precluding respondent from making any further complaints or communications to *any*

one, the language being so broad as to necessarily include the Department of Justice (See Plaintiff's Ex. 110, R. 2952, 2959, 2960).

As soon as Fox got possession of the Brookside Theatre all petitioners (including Fox, Warner Bros. and RKO) immediately made available and continue to make available to the present time all of their feature pictures for exhibition in the Brookside on the third suburban run, which is a run not after the Waldo but *five weeks ahead of the Waldo, one of the preferred suburban runs in Kansas City* (R. 366, 675, 1178, 1373, 1543, 1639, 1664, 1796, 1824, 1911, 1948 and 2406).

Under an appropriate order of discovery respondent was allowed to audit the Fox books which revealed that to August 18, 1950 (the date the audit was terminated because of imminence of trial) the Brookside Theatre had earned net profits of $317,078.02 before depreciation (Plaintiff's Ex. 113, R. 2967). Projecting Fox experience during the first year of Fox ownership back during the time respondent operated and projecting the last year of Fox operation forward to the end of the lease, February 29, 1952 (Plaintiff's Exs. 116, 115, 114, R. 2985-87) reveals that the Brookside Theatre had an earning capacity during the fifteen years of the lease of $392,258.66 *operating only on the third suburban run.*

But the evidence further disclosed that after Fox got possession of the Brookside it did not operate on the same run as an independent exhibitor (unrestrained by the conspiracy) would have done but fitted the Brookside into the Fox hierarchy of theatres on the south side of Kansas City so as not to compete with its Plaza, Isis or Apollo Theatres which operated on the second and third city runs (R. 851-53). Respondent's evidence was that, if an independent

exhibitor had had access to the product, he would have operated the Brookside on the first or second suburban run, which would have doubled or trebled the profits earned by Fox (R. 1374, 1375, 611, 850-56). Respondent's evidence also was that the market value of the Brookside in November, 1937, as distinguished from earnings or profits, free from conspiracy, was at least $300,000 (R. 850, 851).

Respondent, in its complaint, charged the same conspiracy and monopoly in interstate trade and commerce and the same unlawful contracts and business practices as in *United States* v. *Paramount, supra.* The Government's anti-trust suit was filed July 20, 1938—seven months after Fox got possession of the Brookside. The Government in its bill of particulars in the Paramount case listed the Brookside as one of many examples of how independent exhibitors had been driven out of business and forced to turn over their property and business to one of these conspirators (See Plaintiff's Ex. 2, Vol. VIII, Supp. R. 3).

After the results of the Paramount case were assured, this suit was filed. In a seven weeks' trial, commencing November 13, 1950, before a court and jury petitioners were overwhelmed with evidence of their violations of the Sherman Anti-Trust Act to such an extent that the trial judge, in denying petitioners a new trial, declared upon the record "the evidence in the case justified a verdict for plaintiff," and further declared "it is my opinion" that petitioners' "own testimony and exhibits" justified a verdict for respondent (R. 2761-2). The Court of Appeals described petitioners' conduct as "bold, relentless and predatory commercial behavior" (Vol. IX, R. 23). The jury returned a verdict of $375,000.

PARAMOUNT CASE.

A.

The trial court correctly and carefully declared to the jury, insofar as relevant to the case on trial, what was determined in the Paramount case and its significance as prima facie evidence.

Petitioners' assertion, that the trial court left "the determination of the *prima facie* estoppel to the jury rather than informing them of the facts which constituted the estoppel" (p. 11, Petition) in violation of the rule of *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 71 S. Ct. 408, is an unwarranted misstatement of the record. *It is simply not true.* Petitioners do not point to *any place* in the record where the trial court by any language, expressly or impliedly, allowed or permitted the jury to determine for itself the scope of the estoppel created by the Paramount case. They cannot do so. Nothing like that occurred. *The Court of Appeals did not so find.* It could not "erroneously sanction" something that did not occur.

The trial court in meticulous fashion complied with the Emich case. Witness these facts:

The primary record of the Paramount case consisting of the Government's petition, bill of particulars, amended petition, findings of fact and conclusions of law, and final judgments and decrees (except the final decrees against Paramount and RKO, they being by consent) were offered and received in evidence. *None of these was read* to the *jury except* portions of the final decrees (R. 235-39) which incorporated by express reference (R. 236) the findings of fact and conclusions of law. Only such findings of fact (R. 220-34) and findings of fact contained in the conclusions of law (R. 239-48) *were permitted to be*

read to the jury as directly related to the charges contained in respondent's complaint.

When the court came to his charge, he informed the jury that the Paramount case was instituted in the Southern District of New York in July, 1938, by the United States Government against all of petitioners and others, charging certain violations of the Sherman Anti-Trust Act. He informed the jury that a final judgment was entered against six petitioners on February 8, 1950, but that same did not affect RKO and Paramount (R. 2606, 2607). As to those two petitioners, the court charged that, if they were guilty of any of the acts complained of by respondent, such finding must be based on facts outside of the Paramount case (R. 2610).

The court explained to the jury that under the Clayton Act the decree in the Paramount case is *prima facie* evidence (which term he carefully explained) as to facts as to which petitioners against whom the decree was received had been found guilty (R. 2607).

The court then proceeded in separately numbered paragraphs in his charge and in carefully chosen language to *summarize those findings of fact relevant to the case on trial* (R. 2607-2609). The appellate court found (Vol. IX, R. 13) and this court will observe that the trial court in giving the summary confined it to ultimate facts and made no reference to evidentiary facts.

Then the court charged the jury that the ultimate facts which he thus summarized as being determined in the Paramount case did not of themselves establish any fact as to the activities of petitioners in Kansas City, Missouri,[2]

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[2]In this particular the trial judge recognized at the hearing on the motion for new trial that he had unintentionally probably

but that they covered a nationwide situation concerning which the Government complained (R. 2609).

Continuing, the court charged that for respondent to recover, it must establish by other evidence that some violation of the law which occurred generally throughout the country as determined in the Paramount case "was also specifically practiced in Kansas City, and that as a result thereof, the plaintiff was injured in its business or property" (R. 2609). The court charged that, if the matters and things which he thus summarized as having been established by the Paramount case had been proved by respondent to have occurred with respect to its Brookside Theatre, then the jury would have the right (under the *prima facie* rule) to find that they occurred pursuant to the conspiracy and illegal acts thus established by the Paramount case. But he further declared (R. 2609):

> "You cannot find a verdict in favor of the plaintiff simply because these defendants have been unsuccessful litigants in their suit with the Government in New York."

The Court of Appeals found that the trial court did not leave the scope of the estoppel of the Paramount case for determination by the jury (Vol. IX, R. 13):

We invite the court to examine the record (R. 2607-2609), and observe for itself with what care the trial court summarized *only* the ultimate facts determined in the Paramount case (relevant to the case on trial) and defined the scope of the *prima facie* estoppel created by the Paramount case and left nothing for the jury to de-

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deprived respondent of the full measure of benefit of the Paramount case (R. 2761).

termine as to what was or was not decided by the Paramount case and the significance thereof.[2]

B.

There was no error in allowing counsel to correctly refer to the Paramount case, either in opening statements or in closing arguments; nor any error in allowing counsel to read to the jury carefully selected findings of fact from the Paramount case as part of the explanation of the prior Government anti-trust action.

Concerning the manner in which the explanation of the antecedent litigation is to be made to the jury, this court in the Emich case flatly refused to pronounce any hard and fast rules, recognizing that the trial courts must be free to exercise sound judicial discretion in a particular case. This court said:

> "*As to the manner* in which such explanation should be made, *no mechanical rule can be laid down* to control the trial judge who must take into account the circumstances of each case. *He must be free to exercise a 'well established range of judicial discretion'*" (Italics ours).

No point is raised by petitioners as to the propriety or correctness of receiving in evidence the primary record in the Paramount case. No point is raised as to the truth or accuracy of any "references to the Paramount case" made by court or counsel. Petitioners merely assert (p. 10, Petition) that there was error "*in the manner* in which the trial court permitted" these correct refer-

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[2]At the trial petitioners deemed the charge legally correct for the only exception they took to what the court said in its charge about the Paramount case was to the use of the word "guilty" (R. 2659, 2660).

ences to admissible evidence to be made and urge also that it was error for the trial court to allow counsel in opening statement and closing arguments to refer to this same evidence.

Petitioners contend that only the trial judge can say a single word about the antecedent case. If respondent's counsel refers to the fact that there was such a case in his opening statement or refers to the facts he expects to establish *prima facie* by such antecedent suit or urges in closing argument that the jury should find as a fact what has been *prima facie* proved, this constitutes a "radical" departure from the Emich case. We respectfully suggest that counsel have not read the Emich case with understanding.

The Emich case, in addition to declaring that no mechanical rules exist to control the trial judge in a particular case and that he is free to exercise a well-established range of judicial discretion, in unfolding to the jury the fact and meaning of the antecedent litigation, further declares that the trial judge may resort to such portions of the record in the antecedent case as he may find

> *"necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial."*

"Present" means to exhibit or offer to view or notice; to submit for consideration; to put before a person, or introduce. To adequately and appropriately reconstruct and unfold before the jury the antecedent case so that it may know and understand what was decided and apply it correctly to the case on trial, the trial court must necessarily explain the antecedent case by narrating the same or by reading selected portions or both. Where the former

case contains specific findings of fact and conclusions of law it will often be desirable to use the exact language. If portions of the prior case are to be read it is not required that the judge only shall enunciate the words but they may be read by counsel or by the Clerk in accordance with the usual course of procedure in our courts of law.

Consequently, there was no error in allowing counsel to read relevant findings in the language of the court that made the findings which were later summarized by the court in his charge. The assertion by petitioners that there was an indiscriminate reading of findings is not sustained by the record. The Court of Appeals declared (Vol. IX, R. 6) that there were read to the jury only "such portions of the findings of fact and conclusions of law as had direct relation to the charge contained in plaintiff's complaint." Moreover, some findings were read at the express request of petitioners (R. 228).

Still pursuing their untenable position, petitioners complain that counsel were permitted to refer briefly to the history of the Paramount case in the opening statements and to indicate to the jury what facts respondent would seek to establish *prima facie* by the Paramount case. No case is cited and none exists, we submit, which closes the lips of counsel to revealing to the jury *prima facie* facts (resulting from former litigation) any more than revealing to the jury other facts expected to be proved. They must all be resolved by the jury. Since the Paramount case only establishes *prima facie* (for a private litigant) certain facts, they are not conclusive and, therefore, the jury has as much right to know about them from the beginning of the trial so as to evaluate them against all of the other evidence, and so as to evaluate the other evidence

against them, as it has the right to know of other facts expected to be proved. Petitioners never conceded liability at the trial; throughout they constantly asserted their innocence; they sought by evidence and by arguments to the jury which the Court of Appeals has characterized as "vitriolic and denunciatory" and as "extravagant and reprehensible" (Vol. IX, R. 23) to prove that they were not liable. They defended on every ground, including denial of any conspiracy, monopoly or unlawful activities —even laches (!).

Neither is there any error in letting the jury know that the Paramount litigation continued for more than ten years. Petitioners throughout the trial upon the slightest pretext constantly kept before the jury as a pretended defense that respondent had waited from 1937 to 1949 to bring this suit and that it had been dreamed up years after the event. It was important for the jury to know that the results in the Paramount case under the provision of the Clayton Act, the object and purpose of which was to give to private litigants the benefit of the results of the Government suit, were not available during the more than ten years the Government litigation was pending. This court has declared that the objects and purposes of the anti-trust laws are "clearly legitimate subjects for discussion before the jury." *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811, 852.

References to petitioners in closing argument as monopolists and as having been found guilty of violations of the anti-trust laws were clearly proper. Such was the evidence before the jury. The charge was violation of the anti-trust laws of the United States. Respondent introduced evidence, original and *prima facie*, to prove the charge. It had the right to discuss the evidence fully,

freely and frankly with the jury. It had the right to invite and to argue to the jury that it should find as a fact that these petitioners were monopolists, conspirators and violators of the law. Respondent had to prove this before it could recover.

The Emich case declares that, in order to make a submissible case, it is necessary for respondent "only to introduce, in addition to the criminal judgment, evidence of the impact of the conspiracy on them * * * and evidence of any resulting damages." Thus respondent did not need to buttress its case on conspiracy with other facts but, of course, had the right to do so and did.

Suppose, however, it had not done so but had confined itself to the minimum proof approved by this court. If that course had been followed, would anyone suggest that counsel in opening statement could not make appropriate and correct references to the Paramount case so as to give the jury an intelligent understanding of the basis upon which the case was proceeding and the issues they would eventually be called upon to resolve? Or, would anyone suggest that in closing argument counsel could not invite the conclusion, and by all legitimate persuasion, limited only by the evidence and issues, undertake to convince the jury that they ought to conclude, that the damage and injury suffered by respondent was due to the identical conspiracy, monopoly or other unlawful acts established in the Government's anti-trust proceeding? There is nothing in the Emich case circumscribing or limiting the historical right of counsel to make an argument to the jury based upon and within the scope of evidence properly received at the trial. That was all that happened in this case.

Petitioners assert that respondent's counsel was permitted "to present to the jury his interpretation" of the Paramount case and permitted "to give his version" of that case (p. 13, Petition). *This assertion is out of the whole cloth. Petitioners cite this court to no place in the record where any such thing occurred. The record will not sustain the charge made.* The primary record of the Paramount case was introduced in evidence and selected findings of fact read to the jury. No one of counsel on either side presumed to give any version of the Paramount case. The court in its charge declared as a matter of law what had been decided in the Paramount case insofar as relevant to the case on trial.

References to the history of the Paramount case in the opening statement were entirely factual. The Court of Appeals found petitioners' charge to be wholly without substance, saying (Vol. IX, R. 22), "What Mr. Boatright said with reference to this evidence (referring to the Paramount case) was so notorious and well known as to be a matter of history. He referred to no evidence which was not admissible. * * *"

What petitioners seek is a ruling that will keep the triers of the fact completely in the dark concerning the Paramount case until the final charge of the trial court. We submit that such procedure, if followed, would to all intents and purposes nullify the benefits intended to be bestowed by the Act of Congress.

C.

A witness may be impeached by his former testimony and a party's admissions against interest in former litigation may be shown; the fact that such testimony or admissions occurred in the Paramount case does not make them incompetent.

Elmer Rhoden, President of Fox Midwest Theatres, Inc., testified in this case, as he had in the Paramount case, that he had never sought to make agreements with any of the distributors respecting admission prices to be charged by his competitors and that he had never threatened not to play pictures of any of the distributors unless they required independent exhibitors, like respondent, in competition with Fox to maintain certain admission prices and that there could be no business reason impelling him to do so (R. 2423).

He was impeached by his own correspondence with Al Lichtman, then President of United Artists and now Vice President of Fox, wherein Rhoden, speaking for Fox, refused to confirm contracts for exhibition of United Artists' pictures in the Fox theatres until United Artists wired Rhoden that the licensing of United Artists' pictures to independent exhibitors would be "predicated" upon the independents "charging proper admissions." Whereupon, Rhoden wrote United Artists, "Now *we* must agree upon what is the proper admission" for the independents to charge (italics ours) (See Plaintiff's Exs. 163, 164, 165, 166, 167, introduced at R. 2423-28, reproduced in Vol. VIII, Supp. R. 147-167).

The fact that Rhoden had twice given false testimony on the same subject and in the same connection was a proper fact for the jury to know in determining what weight and credibility to give to his testimony. Moreover

no objection was made to reference to Rhoden's similar testimony in the Paramount case (R. 2423).

The other witness, Charles Reagan, Vice President of Loew's, was asked if he had testified on a certain point in the Paramount case. Counsel for petitioners asked the purpose and, when informed it was for impeachment purposes, withdrew his objections (R. 502-514).

Finally, petitioners complain that answers of petitioners to interrogatories propounded to them in the Paramount case were offered and received in evidence. These exhibits were not read to the jury and their introduction in evidence had nothing whatever to do with the *prima facie* case established by the Paramount decrees. The purpose was to obtain factual data not otherwise available to respondent. This factual information was used by the auditors and accountants in preparing certain tabulations and charts which were placed in evidence. These interrogatories constituted admissions against interest.

The circumstance that petitioners' witnesses had made contradictory statements in the Paramount case did not preclude the use of those statements for purpose of impeachment in this case and relevant statements made by petitioners in the Paramount case were not disqualified as admissions against interest in this case.

This court, in the Emich case, said (Footnote 8) as regards to the Government's judgment in the antecedent case,

> "* * * we do not intend to preclude its admission for such other purposes, apart from Section 5, as the general law of evidence may permit."

The Court of Appeals, after considering all of petitioners' contentions with respect to the handling of the

Paramount case, held those contentions to be "wholly without merit" (Vol. IX, R. 13). No one can read this record and the charge and come to any other conclusion.

DAMAGES.

Loss of profits, resulting from tortious destruction or interruption of a business is a proper element for the jury to consider in assessing damages.

Petitioners assert that an "erroneous measure of damages" was adopted which resulted in respondent recovering the profits made by the Fox subsidiary out of the Brookside rather than "the fair market value of its lease at the date of the forced sale" (p. 11, Petition).

Here again petitioners are in part clutching at something the record will not sustain and in part giving a false impression of the charge on the question of damages.

The trial court did not charge that, if the verdict was in favor of respondent, its damages should be assessed at such sum as Fox had made out of the Brookside Theatre. The trial court, in the language of the statute (Section 5 of the Clayton Act, Title 15, U. S. C. A., Sec. 16), charged that, if the verdict was for respondent, the jury should assess the damages at such sum as would fully compensate respondent for the damage done to its business and property as of November 20, 1937 (R. 2620).[4]

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[4]In the trial court's charge the court informed the jury that it had a right to consider that respondent had a 15-year lease; to consider whether or not respondent would have operated the theatre for the full term of the lease except for the conditions concerning which it complained; to consider the sound market value of respondent's business, equipment and leasehold as of November 20, 1937; to consider, if respondent had operated the theatre, whether or not it would have operated on a better run;

On the question of the profits earned by the Fox subsidiary after November 20, 1937, the court charged (R. 2622, 2623):

> "* * * such profits are not necessarily the measure of damages, but simply a circumstance and an element to be taken into consideration."

Consequently, petitioners' statement which is reiterated two or three times in the petition (pp. 6, 7, 8, 14-17) that "the amount of the verdict clearly indicates that the jury considered no other element (than Fox profits) in determining damages," is pure wishful thinking. There is nothing in the record to justify an assertion that the jury disregarded the instructions of the court which were plain and unambiguous.

Lost profits are, of course, a recoverable element of damage where business has been tortiously interrupted or destroyed as the trial court recognized. The cause of action was complete and the damage suffered in legal contemplation on November 20, 1937 (the date petitioners forced respondent to turn over its business), and the trial court, therefore, properly required the jury to fix the damage as of that date. But the trial court was not misled by two red herrings drawn across the path by petitioners. One is petitioners' contention that the only recoverable element of damage was the difference, if any, between the fair market value of respondent's business and property on November

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to consider whether or not, if respondent had operated the theatre, the earnings would have been increased or would have been less; to consider all of the competitive facts that would have come into play, as disclosed by the evidence, if the theatre had been operated on a different run; not to speculate or guess but to fix the damages with reasonable certainty (R. 2620-22, 2625, 2626).

20, 1937, and what Fox Midwest paid for the same. The other is petitioners' contention that evidence of the earnings of the Brookside after November 20, 1937, could not be received to enlighten the jury as to the full extent of the damage suffered by respondent from the tortious loss of its business and property.

The Court of Appeals summarized the situation admirably (Vol. IX, R. 16, 17):

> "The value of the right to continue business, of which the plaintiff was deprived by the wrongful act of the defendants, depended certainly to some extent on its capacity to make profit. * * * If profits that might reasonably be realized from the conduct of a business destroyed by the tortious act of the wrongdoers may not be taken into consideration in ascertaining damages, then the wrongdoer might with impunity destroy a competitor's business and profit by such wrongful act."

Petitioners seek to overturn *Bigelow* v. *RKO Pictures*, 327 U. S. 251, 66 S. Ct. 574, 579, holding that the "fair value" of respondent's "right to continue" its business "depended on its capacity to make profits." They recently made a similar attempt in *Loew's, Inc.*, v. *Milwaukee Towne Corp.*, No. 454, writ denied ..... If petitioners could escape full compensation to their many victims by holding the measure of damages down to "market value" at a given date and excluding from evidence the huge profits they have made from the business and property of their victims, they would be able to retain the "large empires" created by their "predatory practices * * * largely out of the ruins of the small operators," *United States* v. *Paramount*, 334 U. S. 131, 68 S. Ct. 915, 931.

Petitioners assert that *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 51 S. Ct. 248, stands for the propo-

sition that one who wrongfully destroys the business of his competitor can not be liable for more than the market value of the business as of the date of destruction and that the profits that the business might have earned for its owner, had it not been destroyed, may not be considered in fixing the amount of the damage. The *Story Parchment* case stands for no such proposition. In that case this Court cited and quoted with approval from *Allison* v. *Chandler,* 11 Mich. 542, wherein plaintiff, subjected to repeated tortious acts, abandoned his business and sued to recover damages, including lost profits to the end of his lease term, if he had been permitted to conduct his business uninterruptedly. The Michigan court said:

> "* * * This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. *He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such sum*" (Italics ours).

A similar conclusion was reached in *Chapman* v. *Kirby,* 49 Ill. 211, cited and approved by this court in *Weinman* v. *De Palma,* 232 U. S. 571, 34 S. Ct. 370. In that case plaintiff, being forced out of business by wrongful act, sold his plant, closed his business and sued to recover his damage, claiming, among other elements, loss of profits. The Illinois court said:

> "It cannot be held that, * * * appellee should remain inactive, hold his machinery, unfinished stock and fixtures, until the end of his term, * * *. No rule of law or principle of justice could require such a course. * * * The person thus wronged is entitled to recover, for all of the injury he has sustained. * * * And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants?"

Petitioners complain that the lapse of time enabled respondent to prove by Fox operations the tremendous earning capacity of the Brookside Theatre during what they refer to as the "lush war years." There is no merit in the contention. One of the leading decisions on the point is *People's Ice Co.* v. *Steamer Excelsior*, 44 Mich. 229. The court points out why in some cases, when the trial occurs shortly after the cause of action arises, the law, for want of better evidence, permits "the *probable* extent of the damage suffered" to be shown, but, if sufficient time has intervened, the *"actual result"* may be shown; in both cases the extent of the injury being thus legally established with reasonable certainty. Finally, the case demonstrates why the tort feasor cannot complain because favorable seasons are involved in the "actual result." He is not responsible for the favorable times and since all business looks to favorable times to make their profits and recover back losses suffered during unfavorable seasons, "it is not for the wrongdoer to say they shall not."

Nothing can be added to the illuminating language used by Justice Cardozo, in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 53 S. Ct. 736, l. c. 739:

> "At times the only evidence available may be that supplied by testimony of experts * * *. But a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within."

STATUTE OF LIMITATIONS.

A.

The interlocutory or interim decree of November 20, 1940, did not terminate the pendency of the Paramount case; it was merely an auxiliary enforcement procedure adopted for a limited time and concluded nothing.

Five petitioners contend that *U. S.* v. *Paramount*, *supra*, was not pending as against them from November 20, 1940, to August 7, 1944, and that, therefore, the present action is barred as to them under the three-year statute of limitations. The contention rests upon the assertion that the so-called consent decree of November 20, 1940, was a final decree (p. 11, Petition).

Section 5 of the Clayton Act provides that all statutes of limitations are suspended "*during the pendency*" of the Government's suit. Under elementary principles, the history of every suit is comprehended in three stages: Its institution, its pendency and its determination.

> "When once instituted it is thenceforward pending, in every instant of time, until finally disposed of. As expressed by the Superior Court of New Hampshire, the term 'pending' means nothing more than 'remaining undecided.'"
>
> *Ex parte Munford*, 57 Mo. 603.

In *Berman* v. *United States*, 302 U. S. 211, 212, 213, 58 S. Ct. 164, this Court held that a decree was final "'when it terminates the litigation between the parties on the merits' and 'leaves nothing to be done but to enforce the execution of it.'" And in *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 88, 42 S. Ct. 196, this Court said that a final decree was "one that finally adjudicates upon the entire merits, leaving nothing further to be done."

An action is pending so long as the courts either *propose* to consider the matter further on the merits or *may* at the instance of any party consider the matter further on the merits. An action is, therefore, "pending" until finally disposed of.

Petitioners argue that the Government's future use of consent decrees will be seriously hampered under the ruling below. This is another vain grasping at straws. *Nothing like that is involved in this case.* The Court of Appeals has not held that anti-trust litigation may not be finally terminated by consent decrees. Neither has it held that a consent decree which does in fact terminate the litigation is not a final decree. It has merely recognized that the *particular decree* entered in the Paramount case on November 20, 1940, was not intended to and did not in fact terminate the litigation in that case.

The fallacy of petitioners' contention lies in attaching to the words "consent decree" a significance they do not have in and of themselves. Of course, anti-trust litigation brought by the Government, like any other litigation, may be terminated by a consent decree.[3] *Whether a par-*

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[3]The three cases cited by petitioners on page 18 of their petition are no authority for the proposition that the consent decree in the Paramount case was a final decree. In each of those three cases the decree entered by consent was labelled "Final" and was referred to in the body of the decree as "final." That was not so in the consent decree in the Paramount case; the word "final" no where appears in it. In each of the decrees in the cases petitioners cite, the consenting defendants were *forever* bound. But Paragraph XXIII (c) of the consent decree in the Paramount case was expressly included for the purpose of enabling any consenting defendant to apply at any time more than three years after entry to vacate the decree without the necessity of showing new or changed conditions.

ticular consent decree terminates litigation so that it is no longer pending depends upon the character and effect of the decree, not whether it was by consent or otherwise. An interlocutory or interim decree may be by consent and still fall very short of terminating the litigation. It may even have many attributes of a final decree, may employ similar language, may be far-reaching in scope, may even furnish the pattern of the final decree, but if it does not in and of itself finally dispose of the litigation and conclude the issues tendered, it is no final decree, no matter by what name it is called and the action still pends.

Did the decree of November 20, 1940, finally dispose of the Paramount case? The court that rendered the decree says it did not. In *U. S.* v. *Paramount*, 66 F. Supp. 323, it said (l. c. 333):

> "*Counsel for the five major defendants* and their subsidiaries *contend that the consent decree has, in some respects, at least, the effect of a final judgment* which may not be modified. But *we cannot see how such a position is consistent with the language of Section XXIII*(d), *which permits* '• • • *any of the parties to this decree to apply* to the court at any time more than three years after the date of the entry of the decree *for any modification thereof.*' That period has expired, and therefore everything relating to rights under and remedies for violation of the Sher-

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This provision is not to be found in nor is any right similar to or approximating it granted to the consenting defendants by the decrees in the three cases cited by petitioners. The only modification that can be made with respect to final decrees are modifications required by changed conditions which make further operation of the decree as cast unjust and inequitable. No court enters a final decree allowing the parties against whom the decree runs the right to have it vacated, regardless of changed conditions. See the pertinent language of Mr. Justice Cardozo in *U. S.* v. *Swift & Co. et al.*, 286 U. S. 106, 52 S. Ct. 460, 462.

man Act is, therefore, open for consideration, even as between consenting parties; and certainly nothing has hitherto been decided which affected the non-consenting parties" (Italics ours).

Petitioners in their appeal to this court from that decision made the same contention. This court held the contention not good.

> "The consent decree contained no admission of violation of law and adjudicated no issue of fact or law, except that the complaint stated a cause of action." Footnote 3, 334 U. S. 131, 68 S. Ct. 915, 921.

The Court of Appeals, after considering the contention said (Vol. IX, R. 21, 22):

> "We think it clear that the consent decree entered in the Paramount case was not in reality a final decree. It certainly did not terminate the litigation and it was not intended as a final decree terminating the litigation."

The same Court of Appeals, in an earlier case involving these petitioners and this same decree, said:

> "* * * the consent decree was obviously merely 'an auxiliary enforcement procedure' which the court authorized to be used during the *pendency* of the action * * *" (Italics ours).
>
> *St. Louis Amusement Co.* v. *Paramount et al.*, 168 F. 2d 998, 990 (C. C. A. 8).

The trial court in the instant case ruled (R. 127):

> "After very carefully reviewing the briefs submitted * * * and listening with great interest and attention to the splendid arguments of counsel for the respective parties, I have come to the conclusion that the case of *United States* v. *Paramount Pictures, Inc., et al.* * * * was pending within the meaning of Section 16 of Title 15, U. S. C. A. * * * so as to suspend the

running of the statute of limitations against the filing of the present suit."

The District Court in Utah in *Christensen* v. *Paramount Pictures*, 95 F. Supp. 446, 453, 454, rejected the same contentions made by these petitioners:

> "Even against consenting parties the government's complaint, alleging monopoly, and seeking remedies of divorcement and divestiture, was still pending because the consent decree by its own terms excluded these.
>
> This consent decree involved no adjudication, no merger and was not *res adjudicata* as to any issue raised in the complaint."

The Utah court also called attention to the fact that the statutory court expressly declared in the *final decree of February 8, 1950*, that petitioners had violated the Sherman Anti-Trust Act, "both before and after the entry of said consent decree" and, concluded that (l. c. 453):

> "Assuredly, this is unusual, if the consent decree is to be regarded as an adjudication of anything."

The Court of Appeals did not, as petitioners state (p. 11, Petition), hold that the consent decree was not final because it contained a three-year trial period and was subsequently modified. The Court of Appeals held it was not final because it "did not terminate the litigation."

B.

Neither court below had any occasion to consider and did not consider whether the Wartime Suspension Act applies to private parties under the anti-trust laws.

Petitioners concede that neither of the courts below undertook to interpret or apply the Wartime Suspension Act.

When the courts below reached the conclusion that the Paramount case was pending until the motions for rehearing on petitioners' second appeal were overruled by this court, there was no occasion to go further.

Six district courts and one Court of Appeals *unanimously* agree that the Wartime Suspension Act of October 10, 1942, applies to civil proceedings by private litigants as well as civil proceedings by the Government. *No reported case holds to the contrary.* The cases are as follows:

Tiffin Building Corp. v. *Balaban & Katz Corp.*, 87 F. Supp 121 (D. C. N. D., Ill., 1949) (Judge LaBuy).

United West Coast Theatres Corp. v. *South Side Theatres,* 86 F. Supp. 109 (D. C. S. D., Cal., 1949) (Judge Mathes).

Fifth and Walnut, Inc., et al. v. *Loew's, Inc., et al.*, 76 F. Supp. 64, 68 (D. C. S. D. N. Y., 1948) (Judge Ryan).

Theatre Investment Co. v. *RKO,* (D. C. E. D., Wash.) Unreported, Vol. 11, Reporter's Transcript of Trial Proceedings, October 17, 1946, pp. 1115-18 (Judge Bowen).

Russellville Canning Co. v. *American Can Co.*, 87 F. Supp. 484 (D. C. W. D., Ark.) (Judge Miller).

Winkler-Koch Eng. Co. v. *Universal Oil Prod. Co.*, 96 F. Supp. 1014 (D. C. N. Y., 1950) (Judge Nevin).

Suckow Borax Mines Consol. v. *Borax Consolidated,* 185 F. 2d 196 (C. C. A. 9).

CONCLUSION.

Petitioners present no special and important reason for the issuance of the writ. They merely seek another review by an appellate court. They are forced into the position of asking this court to upset the fundamental law of damages; to upset the principle laid down in the Emich case; to grant a special dispensation regarding the finality of judgments. They assert (we have no knowledge of the facts) that they have about 150 cases pending against them "based in part on the conspiracy found in the Paramount case" (p. 14, Petition). If they are as guilty in those cases as in the case at bar, and we are to have a government of law, why should not the same result follow? Why does that afford any reason for this court to intervene? If they are not guilty, the courts in which those cases are pending may be relied upon to see that a just and right result is reached.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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FILED
APR 30 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 674

TWENTIETH CENTURY-FOX FILM CORPORATION, ET AL.,

Petitioners,

against

BROOKSIDE THEATRE CORPORATION,

Respondent.

PETITIONERS' REPLY BRIEF

JOHN F. CASKEY,
BYRON SPENCER,
WILLIAM E. KEMP,
Attorneys for Petitioners.

April 30, 1952.

In the

Supreme Court of the United States

October Term 1951

Twentieth Century-Fox Film Corporation, *et al.*, *Petitioners,* *against* Brookside Theatre Corporation, *Respondent.*	No. 674

PETITIONERS' REPLY BRIEF

The basic premise of respondent's brief in opposition to the petition for certiorari is that petitioners have advanced no reason why this Court should review the decision below. Petitioners have fully set forth in their petition the reasons for the allowance of the writ and have shown that important questions of federal law are involved which should be decided by this Court.

First: The trial court permitted respondent to use the proceedings in *United States* v. *Paramount* in a manner which violated the rule of the *Emich* case. Numerous anti-trust cases are pending which allege that they are based in part on prior government proceedings. Unless this Court corrects the errors in the use of prior government proceedings which were sanctioned in this case, the limited use of prior judgments and

decrees permitted by Section 5 of the Clayton Act as construed by this Court in the *Emich* case will be circumvented.

The errors committed by the trial court with reference to the proceedings in *United States* v. *Paramount* are set forth in the petition (pp. 4-5; 12-14) and record references to these errors are fully set forth in the statement of facts (Petition, pp. 4-5). Petitioners' basic position, as stated in the petition, is that the use made of the proceedings in *United States* v. *Paramount* on the trial of this action was improper in the light of the *Emich* case.

The *Emich* case holds that a criminal judgment may be introduced to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based. The trial judge is given discretion as to what matters he will take into consideration in determining the issues necessarily decided by the prior judgment and verdict. That case states that where the prior judgment was rendered in a criminal case the trial judge may, in his discretion, approve the attachment of a copy of the indictment as an exhibit to the complaint. But even though the *Emich* case permits the trial judge to exercise his discretion as to the manner in which he instructs the jury as to the issues decided in the prior action and the scope of the estoppel, this Court clearly summarizes the manner in which a prior judgment should be handled. The Court states that it is the duty of the trial judge to:

> ". . . (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial." (340 U. S. 558, 572)

The *Emich* case does not sanction plaintiff's counsel's giving his version of the charges or holdings in the prior government case even though the version given by plaintiff's counsel may be factually correct.* Nor does the *Emich* case permit plaintiff's counsel to read findings of fact and conclusions of law entered in the prior proceeding.

The trial judge did instruct the jury that certain findings in *United States* v. *Paramount* could be considered in their determination (R. 2607-2609). But, the jury still had before it the findings read to it by plaintiff's counsel, many of which were different from those summarized by the trial court. The total effect of this handling of the *United States* v. *Paramount* was to leave to the jury the scope of the ultimate estoppel.

SECOND: The rule of damages applied by the trial judge was that plaintiff was entitled to recover the damage which it sustained as of the date of the sale of its theatre. In support

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*At page 15 of respondent's brief the following statement is made:

> "Petitioners assert that respondent's counsel was permitted 'to present to the jury his interpretation' of the Paramount case and permitted 'to give his version' of that case (p. 13, Petition). *This assertion is out of the whole cloth. Petitioners cite this court to no place in the record where any such thing occurred. The record will not sustain the charge made.*"

We respectfully direct this Court's attention to the Record, pp. 171-176 (cited at page 4 of the petition). In his opening statement respondent's counsel, contrary to the present assertion, did give his interpretation and version of the prior government proceedings. In fact, petitioners objected when respondent began to discuss *United States* v. *Paramount* in its opening argument and the trial court in overruling the objection said:

> "The Court: I don't think it ought to be argued. I think they have a right to bring into this case the matters that are involved here and the matters alleged in this complaint, and the objection will be overruled. *But limit them as nearly as you can, Mr. Boatright, please, to the matters that are at issue in this case. You know what they are pretty well.*" (R. 171) [Emphasis supplied]

of this measure of damages the trial court permitted plaintiff to submit to the jury the profits made during the operation of the theatre by the company which purchased it from the plaintiff (R. 722-727, P. Ex. 113). The trial court instructed the jury that these profits could be considered as one of the elements in determining the amount of damages plaintiff sustained on the date of the sale (R. 2620-2621). Petitioners contended that the correct measure of damages was the difference between the market value of the theatre on the date of the sale and what plaintiff actually received for the sale of its theatre.

In *Milwaukee Towne Corp.* v. *Loews, Inc.*, 190 F. 2d 561 (7th Cir., 1951) *cert. den.* January 7, 1952, an anti-trust action involving some of these petitioners, defendants introduced evidence of the actual profits made by plaintiff's theatre during its operation as a first run theatre. The Court of Appeals and trial court disregarded this evidence based on actual operation. In the petition for certiorari filed in the *Milwaukee Towne* case, defendants sought review on the ground, among others, that the decisions of the trial court and the Court of Appeals in that case conflicted with *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689 (cited at page 22 of respondent's brief). This Court denied certiorari.

The number of pending anti-trust actions makes it imperative that this Court clarify the rule of damages which should be applied and the evidence which may be received. Petitioners do not seek to escape liability where such liability is proven, but recovery under the Clayton Act must be in accordance with accepted principles of the measure of damages.

THIRD: The courts below held that the 1940 consent decree entered into by five of the petitioners was not a final

decree which terminated the litigation. Numerous private anti-trust actions are pending in which this precise question is involved and it is important that, in connection with these actions now pending in various District Courts, the question of the finality of the 1940 consent decree be resolved. This Court has not previously passed upon the question as to whether an action is terminated by a consent decree when the government at a later date seeks to modify that decree.

Petitioners urge that a decree entered upon consent is a final decree even though the government might at a later date, under the terms of the decree, move to modify. The provisions of the consent decree on which respondent relied in the lower courts to deprive that decree of its finality were included to meet special economic conditions in the industry. The Court of Appeals reached the conclusion that because the 1940 consent decree did not dispose of the litigation, therefore, it was not a final decree. This conclusion completely ignores the fact that in the period from the entry of the decree until the government filed its motion to modify, there was no proceeding pending against these five defendants. Petitioners conceded on the trial of the action that after the motion to modify was made proceedings were pending against these five defendants until terminated by new decrees.*

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*In considering the decree to be entered in 1946, the court stated (66 F. Supp. 323, 339):

"It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion."

The Decree entered by the Expediting Court on December 31, 1946, did set aside the 1940 Consent Decree, which had then been in effect for over 6 years, for it contained the following provision:

"V. The provisions of the existing consent decree are hereby declared to be of no further force or effect, except in so far as may be necessary to conclude arbitration proceedings

Respondent relies upon a statement found in the opinion of the Expediting Court (Rsp. Br. pp. 25, 26). The question before the Expediting Court was not whether the *Paramount* case had been pending from 1940 until 1944, but whether the government, under the 1940 decree, had the right to apply for a modification of that decree. The court merely stated that the decree could be modified because it contained an express provision permitting any of the parties to apply for modification within three years after entry of the decree.

If the government had never moved to modify the 1940 consent decree it would not and could not be argued that the entry of that decree did not terminate the litigation against the consenting petitioners. The finality of a decree is not affected by future events and the fact that subsequent to the entry of the decree the government saw fit to modify does not make the 1940 consent decree any less final.

Fourth: Although neither court below passed upon the applicability of the Wartime Suspension Act, the question as to whether that Act is, in fact, applicable to private anti-trust actions is vitally important and should be decided by this Court. The question will be reached in this case if this Court decides that the 1940 consent decree was a final decree which began the running of the statute of limitations.

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now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves."

The provision above is clear proof that the court recognized that its new decree was a modification of the 1940 consent decree.

For the reasons stated above and for the reasons advanced in petitioners' petition for certiorari, it is respectfully requested that this Court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the important questions of federal law presented by this petition.

Respectfully submitted,

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April 30, 1952.